In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 709

PROVIDENT SECURITY LIFE INSURANCE COMPANY, AND JOHN S. GORSUCH AND ALBERT J. DOIG, PETITIONERS,

vs.

ANGUS J. DE PINTO, HJALMAR B. LANDOE, FRANCIS I. SABO, EDWIN B. PEGRAM AND ELMER W. DUHAME, RESPONDENTS.

CROSS PETITION OF ANGUS J. DE PINTO FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cross Petitioner, Angus J. DePinto, prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the District Court is unreported. It is found in Appendix A in the Petition for Writ of Certiorari filed herein by the Petitioners Provident Security Life Insurance Company and John S. Gorsuch and Albert J. Doig. The opinion of the Court of Appeals is reported at 323 F. 2d 826 and is found in Appendix B of said Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1963. On November 20, 1963, the Court of Appeals denied the Petition For a Rehearing filed by DePinto and Duhame. The jurisdiction of this Court is invoked under 28 U. S. C., §1254 (1).

QUESTION PRESENTED FOR REVIEW

Where the trial court erroneously entered Judgment N.O.V. and the prevailing party did not join with his Motion For Judgment N.O.V. a Motion For New Trial, or pray for a new trial in the alternative, may the Appellate Court remand the case for a new trial rather than remand with instructions to enter judgment on the verdict?

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

The question presented for review involves Rule 50(b) of the Federal Rules of Civil Procedure, which reads:

> "(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged,

may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

STATEMENT OF THE CASE

Upon the original trial of this action, a jury rendered a verdict against Niesz, Sabo, Pegram and Landoe in the amount of Twenty Thousand Dollars ($20,000.00). The jury rendered a special verdict wherein it found that Cross Petitioner DePinto was not guilty of negligence or breach of fiduciary duty, which proximately caused or contributed to cause loss and damage to United Security Life. (R. 304) Plaintiff moved that all of the verdicts be set aside and that judgment be entered against DePinto and others, in accordance with plaintiff's Motion For a Directed Verdict, which was made at the close of the testimony. (R. 306) Plaintiff did not join with his Motion For Judgment N.O.V. a Motion For New Trial, nor did he pray for a new trial in the alternative. Judgment was entered pursuant to plaintiff's Motion. (R. 354)

In its opinion, the Court of Appeals stated:

"The trial court does have power, where the record warrants, to set aside a jury verdict for plaintiff, on the ground that the jury award of damages

is inadequate. But when that is done the only recourse is to grant a new trial. Where this procedure is followed, however, the granting of a new trial is not reviewable prior to the second trial, as it is an interlocutory order. See Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 254, 61 S. Ct. 189, 85 L. Ed. 147.

While appellees did not move for a new trial, and the trial court did not purport to grant one, the necessary effect of the order setting aside the verdict was, for the reasons indicated, to grant a new trial. Accordingly, we cannot at this time concern ourselves with the question of whether the trial court should have set aside the verdicts.

It follows that all questions presented on this appeal pertaining to the evidentiary showing as to negligence of breach of fiduciary duties may not be decided at this time.

There are also certain other questions presented on this appeal. But they are not of a kind which requires decision now in order to provide guidance as to the remanded proceedings. Nor will they be presented here again unless plaintiff prevails in the further proceedings and then only if the judgment is of the same kind as that which is before us on this appeal. If these questions do arise again, they can best be dealt with on the record for that appeal.

The judgment is reversed and the cause is remanded for a new trial." (323 F. 2d 838)

REASONS FOR GRANTING THE WRIT

The Court of Appeals has erroneously interpreted and applied Rule 50(b) of the Federal Rules of Civil Procedure. When a Motion For Judgment N.O.V. is not accompanied by a Motion For New Trial, or a

prayer for new trial in the alternative, and where the record does not support a Judgment N.O.V., neither the trial court nor the Appellate Court has the power to grant a new trial after the expiration of ten (10) days from date of judgment.

ARGUMENT

The justification, if any, for the Court of Appeals to view the action of the trial court as the granting of a new trial with respect to the defendants against whom "inadequate" verdicts had been rendered does not apply to Cross Petitioner DePinto. The jury verdict was in his favor. The trial court had no alternative other than to enter Judgment for DePinto for the reason that "where uncertainty arises either from a conflict of testimony, or because, the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question is not one of law, but of fact, to be settled by the jury." *Best v. District of Columbia*, 291 U. S. 411, 415. So far as DePinto is concerned, the action of the trial court was, in both form and substance, no more nor less than the granting of a Judgment N.O.V. The trial court had no jurisdiction to grant a new trial except in strict accordance with Rule 50(b), or Rule 59 of the Federal Rules of Civil Procedure. The plaintiff did not move for a new trial, and the trial judge lost jurisdiction to grant a new trial, on his own initiative, ten days after the entry of judgment. *Gilliland v. Lyons* (9 Cir.) 278 F. 2d 56; *Chicago & N. W. Ry. Co. v. Britton* (8 Cir.) 301 F. 2d 400; *Tsai v. Rosenthal* (8 Cir.) 297 F. 2d 644. The jurisdictional limitation cannot be avoided by labeling or treating a Judgment N.O.V.

as an Order granting a new trial. The judgment was in no sense an interlocutory order. It was a final judgment, which the Court of Appeals had the power and duty to review under the provisions of §1291 of Title 28, *U. S. C.*

It appears to be the rule that when a trial court concludes that a proper basis exists for granting a timely, well-grounded Motion For Judgment N.O.V., it has a discretion to grant the lesser relief and to order a new trial instead if justice would thereby better be served. This is so, even though no motion for a new trial has been filed and even though ten days have elapsed since the entry of judgment. The discretion to grant the lesser relief, however, comes into being only when the record is such that the entry of Judgment N.O.V. would be warranted. Where, however, the record will not justify the direction of a verdict, and the Motion For Judgment N.O.V., though timely, cannot be granted; Rule 59(b) and Rule 59(d) then govern. If, under the circumstances stated, a Motion For New Trial is not made within ten days after the entry of judgment, the trial court has no power to enter an order for a new trial after the expiration of the ten-day period. *Jackson v. Wilson Trucking Corp.* (U. S. C. A., D. C.) 243 F. 2d 212. Also, see *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243; *Johnson v. New York, New Haven & Hartford R. Co.*, 344 U. S. 48.

Where a Judgment N.O.V. has been erroneously entered and the successful party has not, in the alternative, asked for a new trial, then upon reversal by a Court of Appeals the case should be remanded to the trial court with instructions to enter judgment on the

verdict. *Simonds v. Capital Transit Co.* (U. S. C. A., D. C.) 147 F. 2d 570; *Hanson v. Ford Motor Company* (8 Cir.) 278 F. 2d 586; *Hansen v. Firestone Tire & Rubber Co.* (6 Cir.) 276 F. 2d 254; *Vera Cruz v. Chesapeake & Ohio R. R.* (7 Cir.) 312 F. 2d 330; *Edwards v. United States* (6 Cir.) 140 F. 2d 526; *Bruin v. Tribble* (4 Cir.) 238 F. 2d 12.

We respectfully submit that the Cross Petition for a Writ of Certiorari should be granted for the reason that the decision of the Court of Appeals for the Ninth Circuit, insofar as it requires the trial court to grant a new trial rather than enter judgment on the verdict in favor of Cross-Petitioner DePinto, is in conflict with the decisions of numerous other Courts of Appeals as shown hereinabove.

Respectfully Submitted

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